United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-2149

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2149

- - - - -

WILLIAM T. McNELLIS,

Appellant,

-v-

UNITED STATES OF AMERICA,

Appellee.

- - - - -

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DICTRICT OF CONNECTICUT

- - - - -

BRIEF FOR APPELLANT

- - - - -

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, the District Court abused its discretion in denying Appellant relief without an evidentiary hearing?

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-2149

- - - - -

WILLIAM T. McNELLIS,

Appellant,

-v-

UNITED STATES OF AMERICA,

Appellee.

- - - - -

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

- - - - -

BRIEF FOR APPELLANT

- - - - -

William T. McNellis respectfully appeals from an Order of the United States District Court for the District of Connecticut (Richard C. Zampano, J.), denying his Motion to Reconsider a previous Order of the same Court rendered September 20, 1977, therein denying his Title 28, U.S.C., Section 2255 Motion alleging therein that the Government knowingly used perjured testimony to

secure his conviction. Judge Zampano denied relief without an evidentiary hearing.

The abbreviation "R," followed by the appropriate Document Number, shall be designated as a reference to the Record on Appeal; the abbreviation "A," followed by the appropriate page number shall be designated as a reference to Appellant's Appendix; and, the abbreviation "tr." shall be used as a reference to the pages of the trial transcript held in the United States District Court for the District of Connecticut in Criminal Case No. 13,220.

STATEMENT OF THE FACTS

I. THE TRIAL, CRIMINAL CASE NO. 13,220

William T. McNellis, Appellant, was indicted December 13, 1972, at New Haven, Connecticut, Criminal Case No. 13,220, in a three-count indictment charging him with bank robbery by force; taking money in excess of $100.00; and putting in jeopardy the life of another, crimes of Title 18, U.S.C., Sections 2113(a), 2113(b), and 2113(d), respectively.

Trial commenced on October 10, 1973, in the United States District Court for the District of Connec-

ticut, before the Honorable Richard C. Zampano, USDCJ, and a jury. The government's case at trial was based almost entirely on the testimony of Aedan McCarthy, an alleged accomplice and admitted perjurer, and, himself, at the time of trial, a recently convicted felon within the same District but before a different Judge.[1]

At McNellis' trial, McCarthy was examined, under oath and in the presence of the jury, as to whether any promises had been made to him regarding the length of time he would be required to serve on his 10-year sentence previously imposed on him by Judge Newman, and what his expectations were concerning a future reduction or parole (A. 7-20). Under questioning by defense Counsel, Judge Zampano, and Peter Clark, AUSA, McCarthy denied to the Court and the jury that any promises had been made or that he expected any "help" from

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[1] On May 25, 1973, after a plea bargain was reached, McCarthy entered a guilty plea to Count II of a three-count indictment (Criminal Case No. 13,202) charging him with a violation of 18 U.S.C. Section 2113(b) which carries a ten-year maximum sentence. On September 4, 1973, (one month before Mcnellis' trial in CR 13,220), McCarthy was sentenced to a 10-year sentence by Judge Jon O. Newman in the District of Connecticut; and, on October 3, 1973, (one week before McNellis' trial commenced), McCarthy filed in the District Court a Motion for Reduction in Sentence to which the government stated on the record that it would have no objection to Judge Newman hearing McCarthy's Motion beyond the 120-day jurisdictional limit (A. 21-23).

the government in obtaining an early release. McCarthy was also questioned, out of the jury's presence, regarding his "deal" with the government in exchange for his testimony, but failed to reveal any promise or expectation as to how much (or how little) time he would be required to serve on his 10-year sentence (A. 7-8), even though Judge Zampano pointedly asked McCarthy whether there were "any other promises" (A. 7). Judge Zampano also asked Peter Clark, AUSA, whether there was anything in the government's files at that time which would indicate that McCarthy had been offered "leniency or benefits that have not been disclosed on the record," to which Peter Clark, AUSA, replied in the negative (A. 9).[2]

In order to shed greater light on McCarthy's agreement with the government and his expectations in exchange for his testimony against McNellis, trial counsel for McNellis sought to interview McCarthy's wife, Barbara J. McCarthy, during the trial, but the government foreclosed her availability to the defense.

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2 The government withheld the fact that McCarthy's attorney, Francis J. Pavetti, Esq., had filed a Motion for Reduction of Sentence prior to McNellis' trial which was unknown to the defense; the government also withheld the fact that it had responded to the Motion during McNellis' trial by indicating that it would have no objection for the Court to entertain the Motion beyond the 120-day jurisdictional limit, and further kept secret until January 7, 1974, (almost one month after McNellis' sentencing), all motions and transcripts filed in McCarthy's case, Criminal No. 13,202.

In its summation before the jury at McNellis' trial, the government argued that it had "never promised" McCarthy any help in obtaining an early release (Tr. 1014-1015).[3]

On October 26, 1973, after the jury had deliberated for twelve hours and had requested a repeat of the Court's credibility charge, McNellis was found guilty on all counts. McNellis was sentenced on December 18, 1973, by Judge Zampano to a 19-year term of imprisonment.[4]

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3 On November 14, 1975, in a letter addressed to Lawrence A. Carpenter, Regional Director, U. S. Board of Parole, Peter A. Clark, AUSA, stated, "...I would urge that every possible consideration be given to Mr. McCarthy at such time as he appears before the Parole Board. * * * From the very beginning Mr. McCarthy's cooperation with us and with local authorities was extensive to the best of my knowledge 100% truthful, and of great assistance to all law enforcement authorities."

4 Eight days prior to McNellis' sentencing, and, unknown to McNellis or his trial attorney, Judge Jon O. Newman, USDC, called a hearing on McCarthy's Motion for Reduction of Sentence in Criminal Case No. 13,202, which was ultimately denied on January 11, 1974.

McNellis' judgment of conviction was affirmed by this Court on April 18, 1974, and the United States Supreme Court denied certiorari on October 15, 1974.

II. MOTION TO VACATE SENTENCE

On December 10, 1976, McNellis filed, pro se, a Section 2255 Motion in the United States District Court for the District of Connecticut alleging that the government's key witness at trial committed perjury and that the government was well aware of the deception (R. Document 2). McNellis supported his motion with an affidavit and memorandum of law in which he argued that McCarthy's sworn testimony during trial in Criminal Case No. 13,220 and McCarthy's sworn testimony before Judge Newman in Case No. N-74-95 (McCarthy's hearing on his motion to vacate sentence alleging, inter alia, that his guilty plea was void because of the government's broken promises) glaringly contradicted each other regarding McCarthy's belief as to what promises had been made to him by the government in exchange for his testimony. In McCarthy's hearing before Judge Newman, as well as in letters submitted to the District Court, McCarthy emphatically stated that even though he had received a 10-year sentence before he testified in McNellis' trial in Criminal Case No. 13,220,

he still believed during the time of his testimony at McNellis' trial, that his 10-year sentence would ultimately reduced (A. 28-36).

On December 10, 1976, Judge Zampano ordered the government to respond to McNellis' allegations (R. Document 1), with the government filing its response on January 14, 1977 (R. Document 4). Judge Zampano denied McNellis' motion, without calling an evidentiary hearing, on September 20, 1977 (A. 3-6).

On October 20, 1977, McNellis filed a Motion to Reconsider with an attached appendix (R. Documents 11 and 12), which was denied by Judge Zampano on October 27, 1977.

Timely Notice of Appeal was filed on November 8, 1977, and McNellis now respectfully appears before this Honorable Court seeking appellate review pro se, and in forma pauperis.

ARGUMENT

THE DISTRICT COURT COMMITTED ERROR IN DENYING APPELLANT RELIEF WITHOUT AN EVIDENTIARY HEARING.

I. APPELLANT HAS SUSTAINED BURDEN OF PROOF

It is well settled that in order to be entitled relief from conviction on ground that perjured testimony was deliberately used in obtaining conviction, as is alleged in the instant case, the petitioner must show that testimony was, in fact, perjured; that the perjured testimony was material to the conviction; and, that the prosecutor either participated in, or had knowledge of the perjury. Jackson v. United States, 338 F. Supp. 7 (D.C.N.J., 1971), affirmed 455 F.2d 991, cert. denied, 406 U.S. 947.

A. The Testimony was, in fact, perjured

The instant case clearly demonstrates that the chief government witness, Aedan McCarthy, testified at length at McNellis' trial (C.R. 13,220) regarding his belief and understanding of the promises made to him by the government in exchange for his testimony, and then, later, glaringly contradicted his trial testimony when he testified in a hearing held on his motion to vacate sentence before the Honorable Jon O. Newman, Judge District of Connecticut in the case of Aedan McCarthy v. U. S. Government, et al., Docket No. N-74-95 (1/2/75).

The record in the instant case, upon which Judge Zampano relied to deny relief to McNellis, also reveals McCarthy to be an admitted perjurer (A. 15-16).

McCarthy testified during McNellis' trial that he expected no help from the government in a reduction of his then 10-year sentence (A. 18), and that he expected no help from the government in securing an early release on parole (A. 10). However, following McNellis' conviction in C. R. 13,220, McCarthy considerably altered his trial denials that he would not receive, nor did he expect, a sentence reduction. Instead, after McCarthy had been denied a sentence reduction by Judge Newman, he wrote the following to the Court (A. 28):

> "...I have received your ruling on my motion for a reduction of sentence this week. I was very surprised by your ruling denying my motion to reduce sentence, because both my wife and myself had been assured repeatedly by Special Agent Stallnaker of the F.B.I. that my sentence would be reduced by your Honor. * * * The only reason that I haven't brought this information to your Honor's attention before this time, is that Agent Stallnaker told my wife that my ten year sentence would definitely be reduced, and that the only rea-

> son that I did receive a ten year sentence was to make it look better for the Government's side when I testified in these various cases. * * * I would appreciate any consideration Your Honor can show me in this matter, and my wife and I are both ready and willing to swear under oath to the truthfulness of and and all statements and accusations that I have made in this letter." (Emphasis added).

Treating the above letter as a renewed Rule 35 Motion by McCarthy, even though the letter came well past the 120-day jurisdictional limit, Judge Newman ruled in an Order filed March 1, 1974, that the Court declined to reconsider the motion to reduce sentence.

In addition to contradicting his McNellis trial testimony in letters such as the one quoted above, McCarthy filed a Petition for Writ of Habeas Corpus in Judge Newman's Court alleging, inter alia, that he had been coerced into his plea of guilty. Judge Newman conducted a hearing on the motion on December 16 and 17, 1974 (Case No. N-74-95), to hear the sole issue of whether or not McCarthy's original agreement for his testimony and cooperation was broken by the government regarding immunity on both the federal and state level. During this hearing, McCarthy glaringly contradicted his testimony he gave in McNellis' trial:

> "...From talking with Mr. Stalnaker, I was under the impression that even though I was pleading guilty to a ten-year count, I would only get a couple of years in the federal court. * * * I believe at the time through conversations which were made between Thurl Stalnaker and my wife that I was going to get - - no matter what my sentence was, if I got the maximum sentence, I was going to get a reduction at a later date." (A. 35-36). (Emphasis added).

Francis J. Pavetti, Esq., McCarthy's attorney at the time the plea negotiations were taking place between McCarthy and the government, testified at this hearing that it was McCarthy's understanding that he would not have to serve any time (A. 33).

Judge Newman denied McCarthy relief in an Order dated January 2, 1975.

During McNellis' trial, McCarthy also testified that no government official promised him assistance in securing a parole; however, a letter written by Peter A. Clark, AUSA, reveals facts to the contrary (A. 26-27). It is certainly worth noting here that McCarthy's testimony and letters blatantly contradict one another when one compares his testimony in McNellis' trial and

in his own hearing held in N-74-95 before Judge Newman. Interestly, Peter A. Clark, AUSA, still advised

the U. S. Board of Parole in his letter (A. 26), that McCarthy's cooperation was "...100% truthful."

It is respectfully submitted that McCarthy's McNellis Trial testimony contradicts his later testimony during his 2255 hearing before Judge Newman. Therefore, it is quite obvious that McCarthy lied during his testimony held in one of these court appearances. McNellis respectfully contends that the perjury was committed at trial in Criminal Case No. 13,220.

B. The Perjured Testimony was Material to the Conviction

Generally, the test for materiality - "is whether there was a significant chance that this added item (McCarthy's actual belief for a reduction in sentence at a later date), developed by skilled counsel...could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Sperling, 506 F.2d 1323, 1333 (2nd Cir. 1974), cert. denied, 420 U. S. 962 (1975); United States v. Miller, 411 F.2d 825, 832 (2nd Cir. 1969). Had the jury known that McCarthy responded untruthfully, the exposure could have created a sufficient doubt in the minds of enough jurors to affect the result, particularly in view of the fact that the jury

deliberated over twelve hours after it had requested a repeat of the court's credibility charge.

C. The Prosecution had knowledge of the Perjury

We have already discussed, supra, the facts which revealed McCarthy's subjective expectation of a sentence reduction in view of his testimony before Judge Newman in N-74-95. It must be remembered that McCarthy testified during Judge Newman's hearing that F.B.I. Agent Stalnaker promised both McCarthy and his wife, Barbara J. McCarthy, that McCarthy would receive a reduction in sentence. The record reveals, however, that Barbara McCarthy was not called to testify in Judge Newman's hearing (A. 37), a fact which Judge Newman criticized in denying McCarthy relief (A. 39). Moreover, at the time of McNellis' trial, defense counsel attempted to interview Barbara McCarthy to ascertain whether she could shed light on McCarthy's understanding of his "deal" with the government; however, upon the advice of Agent Stalnaker and Peter A. Clark, AUSA, Mrs. McCarthy, who was at the time of trial under the exclusive control of the government, submitted an affidavit therein declining to be interviewed.

The most compelling area in the instant case which tends to show that the prosecution knew of McCarthy's

expectation for a sentence reduction is the fact that exactly one week prior to McNellis' trial, in which McCarthy was to testify for the government, McCarthy's attorney, Francis J. Pavetti, Esq., filed in the same District Court a Motion for Reduction of Sentence, and on the same date of filing the motion, served a copy upon Peter A. Clark, AUSA (October 1, 1973) (A. 21-22). The facts further show that during McNellis' trial, Peter A. Clark, AUSA, wrote a letter to Pavetti concerning the reduction motion (A. 23), to which Pavetti wrote to Judge Newman (A. 24), and which Judge Newman wrote a reply on October 30, 1973 (A. 25). Thus, it is clearly revealed that the prosecution was well aware, at the time of McNellis' trial, that McCarthy had filed a motion for reduction of sentence, a fact which was not known to the defense. But, yet, when Judge Zampano at trial pressed the government for disclosure by asking, "Do you (Mr. Clark) have anything in your file that would indicate Mr. McCarthy was offered leniency or benefits that may have not been disclosed on the record?" the government responded, "No, your Honor..." (A. 9). Thus, the defense was denied access to the events surrounding McCarthy's Motion for Sentence Reduction as well as testimony from Mrs. McCarthy concerning these events. Therefore, neither Judge Zampano nor the jurors were made aware that McCarthy

did, in fact, expect a reduction of sentence, which would, had the events come to light, bore heavily on McCarthy's credibility.

As long ago as Mooney v. Holohan, 294 U. S. 103, 112 (1935), the U. S. Supreme Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This ruling was reaffirmed in Pyle v. Kansas, 317 U. S. 213 (1942). And, in Napue v. Illinois, 360 U. S. 264 (1959), the High Court said, "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269.

The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction. See, e.g., Moore v. Illinois, 408 U. S. 786, 797-98 (1972); Giglio v. United States, 405 U. S. 150, 154 (1972); Napue v. Illinois, 360 U. S. 264, 269 (1959); United States v. Sperling, 506 F.2d 1323, 1333 (2nd Cir. 1974), cert. denied, 420 U. S. 962 (1975). Moreover, negligent suppression on the part of the government would run afoul of its independent responsibilities arising under Brady v. Maryland, 373 U. S. 83 (1963),

where the Supreme Court of the United States held that, "the suppression by the prosecution of evidence favorable to the accused violates due process, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Where, as here, there was neglect, rather than prosecutorial misconduct, a higher standard of materiality is required. In this posture, the test is that followed by this Court in United States v. Miller, 411 F.2d 825, 832 (2nd Cir. 1969).

The taint of McCarthy's false testimony is not erased because his untruthfulness affects only his credibility as a witness. "The jury's estimate of the truthfulness and reliability of a given witness (here the key witness) may well be determinative of guilt or innocence..." Napue v. Illinois, supra, 360 U. S. at 269. It is so here in view of the fact that it took the jury over 12 hours to reach a verdict. It must also be remembered that McCarthy's testimony in Criminal Case No. 13,220 was the only trial in which he testified (total of four) against McNellis that resulted in a conviction.

Had the fact been presented at trial that McCarthy believed he was to receive a substantial reduction in sentence, his only sentence at the time of trial, McNellis' fate may well have been differently decided. Although the true answer to the precise question must remain unknown,

it is respectfully submitted that enough has been established in the record herein presented to demonstrate that the material withheld touches upon the constitutionally protected rights of McNellis and impairs the validity of the verdict returned against him. See: United States v. Seijo, 514 F.2d 1357, 1365 (2nd Cir. 1975).

II. THE DISTRICT COURT'S DENIAL OF RELIEF WITHOUT AN EVIDENTIARY HEARING IS CLEARLY ERRONEOUS

The pertinent part of Title 28, U. S. C., Section 2255 which applies to the instant case is the following:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. 2255 (1970).

This Court has consistently held that Section 2255 requires a hearing to resolve disputed issues of fact "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Dalli v. United States, 491 F.2d 758, 760 (2nd Cir. 1974); United States v. Franzese, 525 F.2d 27, 31 (2nd Cir. 1975)(Friendly, J.). And, it is well settled that mere

generalities or heresay statements will not normally entitle the applicant to a hearing, D'Ercole v. United States, 361 F.2d 211, 212 (2nd Cir.), cert. denied, 385 U. S. 995 (1966), rehearing denied, 385 U. S. 1032 (1967); Holland v. United States, 406 F.2d 213, 216 (5th Cir. 1969); Barnett v. United States, 439 F.2d 801,802 (6th Cir. 1971), since such heresay would be inadmissible at the hearing itself. United States v. Pisciotta, 199 F.2d 603, 607 (2nd Cir. 1952). The petitioner must set forth specific facts which he is in a position to establish by competent evidence. Reagor v. United States, 488 F.2d 515 (5th Cir. 1973); Machibroda v. United States, 368 U. S. 487, 495-96 (1962).

In determining whether a hearing should be held, it is noteworthy to examine the U. S. Supreme Court's construction of "conclusively show." In Fontaine v. United States, 411 U. S. 213, 215 (1974), a hearing was required because "(o)n this record, we cannot conclude with the assurance required by the statutory standard "conclusively show" that under no circumstances would the petitioner establish facts warranting relief under Section 2255..." (emphasis added). Thus, a hearing is required if there is any chance that the prisoner will prove the allegations which would warrant relief. Machibroda v. United States, supra, at 496 applied a similar standard requiring a hearing

because "the specific and detailed assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible." Thus, the district court has little discretion to refuse a hearing if the prisoner's facts and legal claims are not contradicted in the record. It is, therefore, respectfully submitted that the instant case warrants a hearing in view of the factual contradiction in the testimony offered by McCarthy

The "fact that is of consequence" is whether the government did (or whether McCarthy believed that the government did) make promises to McCarthy about his reduction in sentence. The letters offered in the court below could not be considered hearsay, because they are not offered for the "truth of the matter asserted" in the letters (Federal Rule of Evidence 801(c)); instead, they have been offered for the possible inferences which may be drawn from the fact that Peter A. Clark, AUSA, made remarks in the letters he submitted. It is respectfully submitted that these letters are "relevant evidence" within the meaning of Federal Rules of Evidence, R. 401.

In denying McNellis relief without an evidentiary hearing, Judge Zampano relied heavily on the "Transcript of McCarthy's proceeding before Judge Newman as well as moving papers prepared by McCarthy's attorney and the

Assistant United States Attorney in charge of McNellis' case" (A.4). The 1974 adjudication of McCarthy's sole claim before Judge Newman (the promise of immunity was broken on a state charge) (A. 32), may possibly have had an impact on an evidentiary hearing for McNellis, but McCarthy's hearing should have in no way affected whether or not McNellis should or should not have been granted a hearing in the instant case. The 2255 statutory requirement of a hearing has only a few exceptions, e.g., if the records conclusively show no entitlement to relief, successive motions "for similar relief on behalf of the same prisoner," or failure to petition the appropriate court. Though a hearing might be denied if McCarthy's claim had been litigated in a previous 2255 proceeding by McNellis or in the appeal of McNellis' conviction (since it would have been a part of the records of McNellis' case), a determination of McCarthy's claim in a separate proceeding, especially one at which McNellis was unrepresented, does not fit an exception for the denial of McNellis' motion without a hearing. Moreover, the government's concern for efficiency receited in its response ("another hearing on the precise grounds already ruled upon by Judge Newman is uncalled for") (R. Document No. 4), should not have

deprived McNellis of his statutory rights to a hearing under Title 28, U.S.C., Section 2255.

CONCLUSION

For the foregoing facts and argument, it is respectfully submitted that the decision of the District Court be reversed, and the Cause remanded for an evidentiary hearing.

Most respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Appellant and a true and correct copy of the Appendix of Appellant was served upon Counsel for Appellee, Hon. Peter A. Clark, Assistant United States Attorney, P. O. Box 1824, New Haven, Connecticut, 06508, by U. S. Mail, this 15th day of February, 1978.

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SWORN TO and SUBSCRIBED before me this 15th day of February, 1978.

Joy Carol Fitzpatrick

NOTARY PUBLIC

Notary Public, State of Florida at Large
My Commission Expires June 8, 1981